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No. 05-60

In The

Supreme Court of the United States

JOHN A. HICKEY,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I.

Whether the failure of the government to present to the grand jury any evidence of one of the elements of a federal criminal offense creates a defect in the indictment giving rise to the right of a criminal defendant not to be tried, and, consequently, the right to an interlocutory appeal under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989)?

LIST OF PARTIES

The parties to the proceedings below were the plaintiff, United States of America and the Defendant-Petitioner, John A. Hickey. Plaintiff is represented by Tim Crudo and Christopher Steskal, Assistants United States Attorney for the Northern District of California (San Francisco).

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PRAYER

The Petitioner, John Hickey, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit decided April 30, 2004.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dismissing Mr. Hickey's interlocutory appeal for lack of jurisdiction is reported at 367 F.3d 888 (9th Cir. 2004), amended, ___ F.3d ___ (March 8, 2005).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a)(1). This petition is filed within the extension of time granted by Justice O'Connor, who, on June 2, 2005, extended the time for the filing to and including July 6, 2005. It is timely filed under the Rules of the Supreme Court of the United States.

[1] On April 30, 2004, the Ninth Circuit denied Petitioner's request for rehearing. (App. 1). Citations to "RT" refer to the Reporter's Transcript of the proceedings below. Citations to "ER" refer to the Excerpt of Record filed in the Ninth Circuit. Citations to "App." refer to the appendix tc this Petition for a Writ of Certiorari. Citations to Petition for Rehearing refer to the Petition for Rehearing and Suggestion for Rehearing *En Banc* filed before the Ninth Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in relevant part,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "

STATEMENT OF THE CASE

A. INTRODUCTION

On April 30, 2004, the Ninth Circuit Court filed its opinion in this case, which was amended on March 8, 2005 upon denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc*. (App. 1-17).

B. PROCEDURAL BACKGROUND

During a pretrial hearing, the district court ordered the government to provide to the defense a redacted copy of the grand jury testimony. Upon review of this testimony, it became clear that, apparently, no evidence of the element of mail fraud – that the documents facilitating the fraud alleged in the indictment were actually placed in the United States mails – was adduced before the grand jury. The superseding indictment, which was returned in January 2002, and well outside the statute of limitations, alleged only mail fraud counts. These counts could only be

legally alleged if the original indictment was valid and tolled the applicable statute of limitations.[2]

Mr. Hickey moved to dismiss the superseding indictment because its mail fraud counts were based on an improper foundation of mail fraud counts in the initial indictment for which no evidence of mailing was presented to the grand jury. The district court reviewed the entire grand jury transcript, but refused to provide it to defense counsel. The district court denied the motion, and stated that, "Now, it's true you [Hickey's counsel] don't have an opportunity to see it yourself and argue to the contrary, and you might well want to argue to the contrary." ER 192.

The government, before the Ninth Circuit, properly argued that the sufficiency of the evidence before the grand jury is not an issue which can be reviewed by the courts. *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Deluca*, 692 F.2d 1277 (9th Cir. 1982). It cannot be reviewed on an interlocutory basis or on appeal after judgment. *Id.* The government did not argue, and has never argued, that *any* evidence of mailings was ever presented to the first grand jury, and has refused, both at the district court and appellate levels, absent court order,

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[2] A defective original indictment is a "nullity" and therefore cannot toll the statue of limitations. *United States v. Crysopt Corp.*, 781 F. Supp. 375 (D. Md. 1991).

The Fourth Circuit has expressly held that a defective indictment confers no jurisdiction whatsoever upon the trial court. *United States v. Hooker*, 841 F.2d 1225, 1231-32 (4th Cir. 1988) (en banc); *United States v. Pupo*, 841 F.2d 1235, 1239 (4th Cir. 1988) (en banc). Accordingly, "a defective original indictment is simply a nullity. An invalid indictment which fails even to invoke the Court's jurisdiction clearly cannot serve to block the door of limitations as it swings closed." *Crysopt*, 781 F. Supp. at 378.

to provide the entire and unredacted grand jury transcript to the defense.[3]

The issue before the Court, however, and the subject of the interlocutory appeal is not whether there was sufficient or missing evidence before the grand jury. Rather, the question as framed by the defense, and addressed by the Ninth Circuit, was whether interlocutory jurisdiction lies if *no* evidence whatsoever is presented to the grand jury on the question of mailings.

The defense argued to the Ninth Circuit that the question of *no* evidence before the grand jury is different from the question of sufficiency, as articulated in *Costello*, because the government, otherwise, could present *no* evidence to the grand jury, print an indictment on the word processor, instruct the foreperson to sign it, and obtain a conviction.

At oral argument, the Ninth Circuit panel engaged in a colloquy with defense counsel about the case of *United States v. Bird*, 342 F.3d 1045 (9th Cir. 2003), which was later withdrawn. The original *Bird* opinion came down after Mr. Hickey filed his opening brief, but before the government filed its answering brief. The original *Bird* case held that the question of whether an indictment, on its face, alleges every element of an offense required by law is subject to interlocutory review. In the colloquy at oral argument, defense counsel pointed out that the issue of whether *no* evidence on an element of an offense is

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[3] In our opening brief before the Ninth Circuit, we argued that the court, if it found it had interlocutory jurisdiction, should then review the entire grand jury transcript to determine if *any* evidence of mailings was adduced.

introduced before the grand jury should be analyzed in the same way as whether the indictment fails to state a required element of an offense. This is because in both cases the grand jury returns an indictment without ever passing on a required element of a criminal charge. *A fortiori*, if there is interlocutory jurisdiction in the first instance, there should be interlocutory jurisdiction in the latter instance. The Ninth Circuit acknowledged, at oral argument that,

> JUDGE: And so that was of course – so that's actually the premise that we start with. In other words, there's predisposition against the interlocutory appeal. But I, grant you. I think that it is appropriate to have an interlocutory appeal and our challenge is to figure out on which side of the line do you fall within *Bird* and the other cases.

Petition for Rehearing, Transcript of Oral Argument, Appendix B at 7.

When oral argument before the Ninth Circuit took place in this case on January 13, 2004, the *Bird* court was considering a Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*. Petition for Rehearing, Appendix C. The *Bird* panel withdrew its opinion on February 10, 2004. *Id.* It then issued an amended opinion on March 3, 2004, *United States v. Bird*, 359 F.3d 1185 (9th Cir. 2004). In the amended opinion, citing to *Abney v. United States*, 431 U.S. 651 (1977), the *Bird* panel reversed itself and found it had no interlocutory jurisdiction over an appeal of an indictment's insufficiency where the question was whether the indictment, on its face, failed to allege a required element of a criminal offense.

The *Bird* issue was never heard by the Ninth Circuit *en banc*, and was never the subject of a Petition for Writ of Certiorari before this Court. The Ninth Circuit panel in this case did not render its decision until April 30, 2004, or until after the amended *Bird* decision came down and the time for the *Bird* appellants to file a suggestion for rehearing *en banc* had expired. In the opinion in this case, the Ninth Circuit panel relied on *Bird* (as amended) in holding that a court may not inquire, on interlocutory appeal, into whether a grand jury has passed upon every element of an offense. In so holding, the panel also found that *Bird* (as amended) had implicitly extended *Costello* to mean that the courts may not inquire into the issue of whether a grand jury has been presented with *any* evidence of a required element of a criminal offense.[4]

Upon denial of rehearing, the Ninth Circuit amended its opinion. The amended opinion held that the question of whether a grand jury has been presented with no evidence concerning one of the elements of a criminal offense does not meet either the second or third prong of Cohen's three part test for interlocutory jurisdiction, that is, that it is not an "important issue" completely separate from the merits of the action, and it is not an issue which involved an

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[4] This case presents an even more powerful argument for interlocutory jurisdiction than the *Bird* situation – the failure of an indictment to state an element of the offense. While the question of the insufficiency of an indictment on its face may be heard and result in reversal on appeal after final judgment, the issue of whether an indictment which is sufficient on its face resulted from the presentation of *no* evidence on one or more elements of a criminal offense might never be heard on direct appeal because the judgment of conviction by the petit jury could be held to render the error harmless. *United States v. Mechanik*, 475 U.S. 66 (1986).

important right which would be lost irreparably if it awaited appeal from the final judgment.

REASONS FOR GRANTING THE WRIT

ARGUMENT

A. INTRODUCTION

Under *Cohen v. Benefical Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), only an order of a district court which satisfies all three prongs of its requirements for interlocutory jurisdiction comes within the small class of decisions excepted from the final-judgment rule, and is subject to an interlocutory appeal. *Id.*

The first prong of *Cohen* is whether the order appealed from conclusively determines a disputed question. The denial of a motion to dismiss an indictment for insufficiency, as is any denial of a pretrial motion, is, obviously, a conclusive determination of the question by the district court. The Ninth Circuit opinion in this case did not disagree with this.

The second prong of *Cohen* is that the proposed interlocutory appeal would resolve an important issue completely separate from the merits of the disputed question. In this appeal, we have argued that, as a matter of law, the government must present to the grand jury at least *some* evidence of every element of a criminal charge. If *no* evidence was presented to the grand jury on the required element of mailing in a mail fraud charge, the charge must be dismissed. This legal question is distinct from the guilt or innocence of Mr. Hickey, which would be

determined by the jury after all of the evidence has been presented to them.[5]

The third prong of Cohen "requires that the order sought to be appealed involves 'an important right' which would be 'lost, probably irreparably,' if review had to await final judgment." *Abney v. United States*, 431 U.S. 651, 658 (1977) (quoting *Cohen*, 337 U.S. at 546).

B. THE SECOND PRONG OF *COHEN* IS MET IN THIS CASE

In *Abney*, the Hobbs Act indictment, less than 18 U.S.C. § 1951, had been challenged before and during trial as insufficient because it was, allegedly, duplicitous. 431 U.S. at 655. The district court, as it may do in the context of a duplicity challenge, properly instructed the jury as to unanimity on either of the alleged offenses allegedly charged in a single count. *United States v. Aracri*, 968 F.2d 1512, 1518 (2d Cir. 1992); *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985); *Thomas v. United States*, 418 F.2d 567, 568 (5th Cir. 1969); *Bins v. United States*, 331 F.2d 390, 393 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Reno v. United States*, 317 F.2d 499, 502 (5th Cir.), *cert. denied*, 375 U.S. 828 (1963); *United States v. Warner*, 428 F.2d 730, 735 (9th Cir.), *cert. denied*, 400 U.S. 930

[5] In *United States v. Mechanik*, 475 U.S. 66 (1986), Chief Justice Burger felt that the entire question of whether there has been Grand Jury error in connection with the presentation of evidence was resolved by *Costello*, and is, therefore and implicitly "not important" for the purposes of review. The rest of the Court in *Mechanik*, and the Court in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), and *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) did not find that *Costello* precludes review and consideration of Grand Jury error in connection with the presentation of evidence.

(1970); *United States v. Greer*, 956 F. Supp. 520 (D. Vt. 1997). On appeal, the Third Circuit reversed on other grounds. As to the duplicity issue, the Third Circuit ordered the government to elect between the conspiracy and attempt charges on remand, and the government elected to proceed on the conspiracy charge. The defense then "moved to dismiss the indictment arguing: (a) that retrial would expose them to double jeopardy; and (b) that the indictment, as modified by the election, failed to charge an offense. The District Court denied the motion, and the petitioners immediately appealed to the Court of Appeals." *Id.*

This Court held that the double jeopardy motion was subject to interlocutory appeal, while the insufficiency motion was not. *Id.* at 662-64. The holding was *not*, however, directed at all insufficiency motions, and was certainly not directed at those involving an indictment's wholesale omission of an element required by law. Rather, *Abney* was directed at whether the facts in the indictment there, as modified by the government's election to proceed on the conspiracy charge on remand, stated an offense.

In the *Abney* duplicity context, it is not surprising that the Supreme Court stated that the order appealed from "is plainly not 'collateral' in any sense of the term; rather it goes to the very heart of the issues to be resolved at the upcoming trial." *Id.* at 663. The question before the Supreme Court, in *Abney*, was whether the fact to be introduced by the government at trial, as framed by the superseding indictment, would or would not amount to a constructive amendment of the charge as modified on remand. That motion could not possibly be determined pre-trial, as many duplicity motions cannot be, and was not subject to interlocutory appeal.

This case, on the other hand, involves an important legal question completely distinct from the facts to be adduced at trial or alleged in the indictment. Where the government, as in this case, failed to present any evidence of an essential element of the charged criminal offense – mailings – and, did it fail to present adequate support for a mail fraud indictment, as a matter of law? 18 U.S.C. § 3141.[6]

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[6] Also, and importantly, there appear to be a class of fundamental grand jury errors – errors which cause an indictment not to be an indictment and give rise to a right not to be tried – which would never be reviewed by this Court after final judgment. This case presents one of them. After *Mechanik*, if the government obtains a conviction, it is unclear that *any* error, no matter how fundamental (other than the type of error recognized in *Vazquez v. Hillery*, 474 U.S. 254 (1986) concerning discrimination in the racial or gender makeup of the grand jury) would not be rendered harmless by the verdict of the petit jury. This Circuit has already held that allegations of prosecutorial misconduct before the grand jury – no matter how serious – are not subject to interlocutory appeal; further, no case has reversed after judgment based upon prosecutorial misconduct before the grand jury because of the holdings in *Mechanik* and *Midland Asphalt*. Here, no evidence was presented to the grand jury on an essential element of the criminal charge. Even if no evidence at all is presented to the grand jury, on any element, it would appear that such fundamental error could be rendered harmless by the petit jury's verdict of guilty, and moot by the petit jury's verdict of not guilty. This Court must clarify that there is an avenue of review to check fundamental Grand Jury error by the government. Of course, some of the fundamental Grand Jury error, as is the case here, would cause an indictment no longer to be an indictment under *Midland Asphalt*, and, therefore, implicate a defendant's right not to be tried.

Justice O'Connor and Justice Marshall, in *Mechanik*, both alluded in, respectively, their concurring and dissenting opinions, to the crucial role of the courts in supervising conduct before the grand jury and in enforcing the requirements of the grand jury clause of the Fifth Amendment and the prescriptions of Fed. R. Crim. P. 6. Both justices, however, struggled with the problem that *Mechanik* apparently effectively ended or seriously eroded any judicial role in assuring that the Grand Jury protections in the Constitution and the Federal Rules of

(Continued on following page)

C. *MIDLAND ASPHALT CORP. V. UNITED STATES* REQUIRES THE CONCLUSION THAT THE FAILURE OF THE GOVERNMENT TO PRESENT ANY EVIDENCE TO THE GRAND JURY CONCERNING ONE OF THE ELEMENTS OF A CRIMINAL OFFENSE MEETS THE SECOND AND THIRD PRONGS OF THE *COHEN V. BENEFICIAL LOAN CORP.* TEST FOR INTERLOCUTORY JURISDICTION

An order of a district court is effectively unreviewable when the order sought to be appealed involves an important right which would be lost, probably irrepararably, if review had to await final judgment. *Abney v. United States*, 431 U.S. 651, 658 (1977). Under *Midland Asphalt*, a defect in an indictment gives rise to the constitutional right not to be tried under The Grand Jury Clause only when it is "so fundamental that it causes . . . the indictment no longer to be an indictment . . . " *Midland Asphalt*, 489 U.S. at 802.

This Court has not considered and resolved the question of what fundamental defects in an indictment would be so fundamental, under *Midland Asphalt*, that an indictment would cease to be an indictment. No court (other than the withdrawn *Bird* opinion from the Ninth Circuit) has considered and resolved the question of whether the failure of the government to present any

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Criminal Procedure are anything more than toothless and unenforceable formalities. It has been 18 years since *Mechanik* was decided, and almost 16 years since *Midland Asphalt*. *Bird I* was the first opinion in the land to grapple with the critical issue of interlocutory enforcement of the right guaranteed by the Fifth Amendment not to be tried on a criminal charge absent a lawfully obtained grand jury indictment. The opinion was correct and necessary. It should not have been withdrawn.

evidence to the Grand Jury of one of the essential elements of a criminal charge would create the type of fundamental defect implicating the constitutional right not to be tried. *See* Benjamin E. Rosenberg, *A Proposed Addition to the Federal Rules of Criminal Procedure Requiring the Disclosure of the Prosecutor's Legal Instructions to the Grand Jury*, 38 Am. Crim. L. Rev. 1443, 1456 (2001) (stating that *Midland Asphalt* left open the question of what errors in the grand jury are so fundamental as to render the indictment no longer an indictment).

It has been 16 years since this Court decided *Midland Asphalt*. That case established three potential classes of cases of grand jury error: (a) technical grand jury error, such as a violation of Federal Rule of Criminal Procedure 6(d) which is not appealable before trial, and which is rendered harmless by the judgment of the petit jury; (b) grand jury error which is appealable after trial, but does not give rise to a right not to be tried (i.e. potential violations of Rule 6(e) of the Federal Rules of Criminal Procedure); and (c) grand jury error that can be appealed after trial, but would also give rise to an interlocutory appeal because it renders the indictment not an indictment, and, therefore, under the Fifth Amendment, implicates a defendant's right not to be tried absent the Grand Jury's return of a lawful indictment.

The Court has not given any guidance in connection with the third class of cases; this case is in that class. We submit that it is apparent that any indictment, such as the one in this case, returned by a grand jury which was presented with no evidence of one of the essential elements of the criminal charge is an indictment which has ceased to be an indictment.

CONCLUSION

This case provides the Court with an opportunity to address the question of when *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) provides for an interlocutory appeal, that is, under what circumstances does an indictment cease to be an indictment giving rise to a defendant's right not to be tried. Because the Grand Jury was presented with no evidence concerning one of the essential elements of the charged mail fraud offenses, the indictment in this matter ceased to be an indictment, implicating Mr. Hickey's right not to be tried, and conferring upon him the right to an interlocutory appeal aimed at dismissing the indictment before trial.

Dated: July 6, 2005

Respectfully submitted,

DAVID J. COHEN
Attorney for John A. Hickey

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN A. HICKEY, *Defendant-Appellant.*	No. 02-10197 D.C. No. CR-97-00218-MMC
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN A. HICKEY, *Defendant-Appellant.*	No. 02-10204 D.C. No. CR-97-00218-MMC OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
January 13, 2004 – San Francisco, California

Filed April 30, 2004

Before: J. Clifford Wallace, M. Margaret McKeown, and
Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

COUNSEL

David J. Cohen, Cohen & Paik, San Francisco, California,
for the defendant-appellant.

Robin Harris, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

OPINION

CALLAHAN, Circuit Judge:

Almost five years after he was first indicted, John A. Hickey filed a number of motions in the district court on the eve of trial. When the motions were denied, Hickey filed two interlocutory appeals, basing appellate jurisdiction on the collateral order doctrine. We determine that none of Hickey's contentions raises a colorable claim under the collateral order doctrine and dismiss his appeals for lack of jurisdiction.

I

In September 1994, the Securities and Exchange Commission ("SEC") filed a civil action against Hickey, his partner, Mamie Tang, and their partnerships. The SEC seized and closed down Continental Capital Financial Group ("CCFG"), which was controlled fifty percent each by Hickey and Tang. The SEC contended that from July 1992 through July 1994, CCFG raised $5 million by selling unregistered limited partnerships in Fund I, and raised $15 million by selling unregistered limited partnerships in Fund II. The SEC alleged that Hickey and Tang violated federal security laws by offering for sale unregistered securities and making material misrepresentations in the materials distributed to investors.

CCFG represented to potential investors that it owned certain real property in California's Napa and Sonoma Valleys and that the investments would allow it to prepare

the land for residential development, at which time CCFG would sell the land or refinance the properties, and pay off the investments. The receiver appointed in the SEC's action represented that the investors' total losses for Funds I and II were over $17.5 million.[1]

In February 2000, the district judge hearing the SEC action ordered Hickey to disgorge $1,106,090.69, money he had personally diverted from Fund II. When Hickey failed to make any payments, the judge in September 2001, held him in civil contempt and threatened to incarcerate him. Hickey then made three monthly payments, and in December 2001, the judge issued an order purging Hickey of contempt. Hickey has now paid the entire $1.1 million judgment into the district court's registry.

Meanwhile, on July 16, 1997, a grand jury returned a 32-count criminal indictment against Hickey and Tang, including several counts of mail fraud. On January 9, 2001, a separate grand jury returned a superseding indictment solely against Hickey, charging multiple counts of mail fraud arising from the same scheme described in the original indictment.

Just before trial, Hickey filed several motions. When the district judge denied his motions, he filed two notices of appeal. The notices stated that Hickey sought appellate review of the district court's denials of his (1) motion to dismiss for violation of the Double Jeopardy Clause of the

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[1] A further statement of Hickey's operations is contained in *SEC v. Hickey*, 322 F.3d 1123, *amended*, 335 F.3d 834 (9th Cir. 2003). We dismissed Hickey's challenge to a contempt order for lack of jurisdiction and affirmed the district court's freezing of the assets of Hickey's real estate brokerage firm.

Fifth Amendment, (2) motion "to collaterally estop the United States from proving that he personally misappropriated and/or misapplied more than $1.1 million from Continental Capital Fund II," (3) motion to dismiss based on insufficient evidence before the grand juries, (4) motion to stay trial, and (5) request for access to the full transcript of the grand juries.[2]

II

Under 28 U.S.C. § 1291, a criminal case is generally not subject to appellate review "until conviction and imposition of sentence." *Flanagan v. United States*, 465 U.S. 259, 263 (1984). Accordingly, denials of pretrial motions are not usually appealable. *See United States v. Cejas*, 817 F.2d 595, 596 (9th Cir. 1987).

These appeals concern a narrow exception to the finality rule: the collateral order doctrine, which was set forth in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). This doctrine allows an immediate appeal from an interlocutory order that "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). Hickey invokes the collateral order doctrine as the basis for all four of the issues he seeks to raise on appeal. As we explain below, none of Hickey's issues comes close to

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[2] Because Hickey's opening brief does not address the district court's denial of his motion for grand jury transcripts, we deem the issue waived. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992).

meeting the *Cohen* standard, and accordingly, we dismiss his appeals for lack of jurisdiction.

III

The pre-trial denial of a colorable double jeopardy claim may be immediately appealed.[3] *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002); *United States v. Gutierrez-Zamarano*, 23 F.3d 235, 236 (9th Cir. 1994). The Supreme Court explained in *Abney v. United States*, 431 U.S. 651, 659 (1977), that a pretrial order denying a motion to dismiss on double jeopardy grounds was a "final decision" within the meaning of 28 U.S.C. § 1291 pursuant to the "collateral order" exception announced in *Cohen*. Such an order is a final rejection of an accused's double jeopardy claim, the very nature of which is collateral to and separable from the issue of whether the accused is guilty of the offense charged. Furthermore, as the Double Jeopardy Clause protects an individual not only from being subjected to double punishments, but also from being twice put to trial for the same alleged offense, this right would be significantly undermined if appellate review were postponed until after conviction. *Id.* at 659-60.

Both the Supreme Court and this court, however, have held that we have interlocutory appellate jurisdiction to reach the merits only of "colorable" double jeopardy claims. *See Richardson v. United States*, 468 U.S. 317, 322

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[3] A denial of a motion to dismiss on double jeopardy grounds is reviewed de novo. *Price*, 314 F.3d at 420; *United States v. James*, 109 F.3d 597, 599 (9th Cir. 1997). A district court's factual findings, however, including those on which a denial may be based, are reviewed for clear error. *United States v. Ziskin*, 360 F.3d 934, 938 (9th Cir. 2003).

(1984) ("Moreover, we have indicated that the appealability of a double jeopardy claim depends upon its being at least 'colorable.'"); *United States v. Sarkisian,* 197 F.3d 966, 983 (9th Cir. 1999) ("A claim of double jeopardy must be at least 'colorable' to confer interlocutory jurisdiction on an appellate court."); *United States v. McKinley,* 38 F.3d 428, 429 (9th Cir. 1994) ("[J]urisdiction does not exist in this case because the double jeopardy claim is not ripe and the vindictive prosecution claim cannot be brought up on an interlocutory appeal."). To be colorable, a double jeopardy claim must have "some possible validity." *Price,* 314 F.3d at 420.

The Double Jeopardy Clause prohibits the government from "punishing twice, or attempting a second time to punish criminally for the same offense." *United States v. Ursery,* 518 U.S. 267, 273 (1996) (internal quotation marks omitted); *see also* U.S. Const. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."). Two questions arise out of this provision. First, is the second offense the "same" as the first? Second, is there an attempt to "punish twice?" The former question triggers the *Blockburger* test. *Blockburger v. United States,* 284 U.S. 299, 304 (1932) ("The applicable rule is that, where the same act or transa... ...n constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."). The latter question triggers the *Hudson* test. *Hudson v. United States,* 522 U.S. 93, 99 (1997) (setting forth factors for determining whether a civil penalty should be considered a criminal penalty).

Under *Blockburger,* "[d]ouble jeopardy is not implicated so long as each violation requires proof of an element which the other does not." *United States v. Vargas-Castillo,* 329 F.3d 715, 720 (9th Cir. 2003). In this case, Hickey contends that the district judge's order of disgorgement of $1.1 million in the SEC's action, and the judge's willingness to incarcerate Hickey, constitute criminal punishment for the same activity as charged in the indictment and bar the government from proceeding criminally against him. The offense for which Hickey alleges he was first put in jeopardy is civil contempt arising out of a civil action brought by the SEC. The offenses for which Hickey alleges the government now attempts to put him in jeopardy are mail, wire, and securities fraud. The elements of the civil contempt and fraud offenses are completely different. Because Hickey's double jeopardy claim does not allege two separate offenses under *Blockburger,* it is not colorable, and we need not reach the issue of how Hickey's claim fares under *Hudson.*

As Hickey has not, and cannot, make a colorable claim that his constitutional right against double jeopardy has been violated, his appeal from the district court's denial of his motion to dismiss on double jeopardy grounds is dismissed for lack of appellate jurisdiction.

IV

Hickey seeks review of the denial of his motion "to collaterally estop the United States from proving that he personally misappropriated and/or misapplied more than $1.1 million from Continental Capital Fund II." Hickey contends that the superseding indictment should be dismissed because it alleges a scheme that requires proof

of losses of more than $15 million when the government is collaterally estopped from proving losses of more than $1.1 million.

Hickey correctly notes that in *Cejas,* we exercised appellate jurisdiction to review a denial of a claim that a prosecution was barred by collateral estoppel. The court held that it had appellate jurisdiction under the double jeopardy exception to the finality rule, explaining:

> The bar to a second prosecution based on collateral estoppel is a principle "embodied in the Fifth Amendment guarantee against double jeopardy." . . . Thus, an order denying a motion to bar retrial based on collateral estoppel – being a double jeopardy determination – is also appealable under the rationale of *Abney.*

Cejas, 817 F.2d at 596 (quoting *Ashe v. Swenson,* 397 U.S. 436, 445 (1970)). Accordingly, Hickey may properly invoke this court's appellate jurisdiction to review his collateral estoppel issue if he has a colorable claim under the double jeopardy exception to the finality rule.

Hickey's claim of collateral estoppel is without merit. Collateral estoppel "means simply that when an issue of ultimate fact has once been determined . . . a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe,* 397 U.S. at 443. Hickey has met neither the common ultimate fact prong nor the same party prong of the collateral estoppel test.

The disgorgement order in the SEC action did not address the extent of Hickey's alleged criminal activities. It was at most a determination of how much Hickey personally had obtained improperly from Fund II. Thus,

the disgorgement order did not purport to determine the losses to investors from Hickey's schemes. Furthermore, the government has agreed not to seek to relitigate the amount Hickey personally misappropriated from Fund II.

Moreover, the SEC, the adverse party in the first proceeding, and the United States are not the same party. The SEC brought its action pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934. It was not acting as "the federal sovereign vindicating the criminal law of the United States." *United States v. Heffner,* 85 F.3d 435, 439 (9th Cir. 1996). Furthermore, Hickey has not rebutted the United States' representation that it did not have "a full and fair opportunity to litigate anything at all in the SEC's civil action against Hickey." *See Standefer v. United States,* 447 U.S. 10, 22 (1980) (indicating that "full and fair opportunity to litigate" is a prerequisite of estoppel).

V

In contrast to his first two claims, which were based on the particular rights inherent in the Double Jeopardy Clause, Hickey's third claim – that the evidence before the grand juries was insufficient – is based on a broader application of the collateral order doctrine.

As noted, this doctrine treats orders by the district court that "finally determine claims of right separate from, and collateral to, rights asserted in the action" as final judgments even though they do not "end the litigation on the merits." *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798 (1989) (quoting *Cohen,* 337 U.S. at 546). We have held that an interlocutory order that falls within the small class of decisions excepted from the final-judgment

rule by *Cohen,* "(1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Pace,* 201 F.3d at 1119 (internal citations and quotation marks omitted).

Hickey does not challenge the facial sufficiency of the indictments. Instead, he contends that the government failed to present any evidence of mailing to the first grand jury in 1997, and that the government only presented indirect evidence of mailing to the second grand jury in 2001. He claims that such evidence is critical because each count of the superseding indictment charges a particular mailing. Hickey argues "[i]nasmuch as the government's failure to present evidence of mailing caused the indictment not to be an indictment, and prevented the grand jury from exercising its function as a grand jury, the indictment and superseding indictments must be dismissed."

Hickey's arguments meet none of the criteria for an appeal under the collateral order doctrine. First, Hickey's challenge to the indictments has not been "conclusively determined." The denial of his motion ' dismiss may result in Hickey having to go to trial, but this is true of the denial of many pre-trial orders, and there is no suggestion that Hickey will be barred from subsequently raising his claim on appeal should he be convicted.

Second, the district court did not resolve an "important issue." Hickey argues that if the grand jury was not provided the type of evidence of mailing that he contends is necessary, the indictment must be dismissed. This

argument is not well taken, at least as a basis for seeking a pre-trial dismissal of an indictment.

In *Midland,* the Supreme Court held that "[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." 489 U.S. at 802. Consistent with this approach, district courts generally may not look behind an indictment before trial. In *United States v. DeLuca,* 692 F.2d 1277, 1280 (9th Cir. 1982), we held that we "do not dismiss an indictment valid on its face absent a showing that the government flagrantly manipulated, overreached, or deceived the jury, . . . "[n]or does incomplete evidence before the grand jury detract from the resulting indictment." Most recently, in *United States v. Bird,* 359 F.3d 1185, 1187 (9th Cir. 2004), we held that we do not have interlocutory appellate jurisdiction to review the district court's rejection of defendants' challenge to the sufficiency of an indictment. Our position is consistent with Justice Black's explanation in *Costello v. United States,* 350 U.S. 359, 408-09 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on

the merits. The Fifth Amendment requires nothing more.

Hickey's allegation of insufficient evidence before the grand jury, even if meritorious, would not rise to the level of a fundamental defect. The Supreme Court and this court have repeatedly rejected appeals from similar pretrial orders.[4]

In addition, Hickey's argument cannot be said to be "completely separate from the merits of the action." The legal consequences of the lack of some item of evidence before a grand jury would appear to depend, at least in part, on the particular charges in the indictment, the other evidence before the grand jury, and the relationship between that other evidence and the allegedly missing evidence.[5]

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[4] *See Midland,* 489 U.S. at 801 (holding that motion to dismiss grand jury indictment for alleged violation of rule prohibiting public disclosure of matters occurring before grand jury was not appealable before trial); *United States v. Moreno-Green,* 881 F.2d 680, 684 (9th Cir. 1989) (holding that order denying defendants' motion to dismiss indictment on basis of alleged prosecutorial misconduct before grand jury was not appealable before trial); *United States v. Shah,* 878 F.2d 272, 275 (9th Cir. 1989) (concluding that orders refusing to dismiss indictment for alleged grand jury misconduct and refusing to compel discovery of grand jury proceedings were not appealable before trial); *United States v. Schiff,* 874 F.2d 705, 706 (9th Cir. 1989) (holding that motions to dismiss indictment and for disclosure of grand jury transcripts were not appealable); *United States v. Hollywood Motor Car Co.,* 458 U.S. 263, 270 (1982) (concluding that order denying motion to dismiss based on prosecutorial vindictiveness was not appealable before trial); *United States v. MacDonald,* 435 U.S. 850, 862 (1978) (holding that denial of motion to dismiss on speedy trial grounds was not appealable before trial).

[5] We note that here the district court reviewed the grand jury transcripts *in camera,* gave Hickey access to some portions of the

(Continued on following page)

Finally, Hickey's claim is not "effectively unreviewable on appeal from a final judgment." In *Midland,* the Supreme Court explained that although the denial of any pre-trial motion might be said to be unreviewable if it requires that the defendant go to trial, the collateral order doctrine only applies where there is an explicit statutory or constitutional guarantee prohibiting trial.[6] Hickey is in the same position as the defendant in *Pace.* There, we dismissed the defendant's interlocutory appeal based on the collateral order doctrine because we determined that the McCarran-Ferguson Act did not protect the defendant from prosecution, noting that whether the Act protected him from federal conviction could be reviewed on appeal from a final judgment. *Pace,* 201 F.3d at 1120.

In sum, to come under the collateral order doctrine, an interlocutory appeal must challenge an order that conclusively determines an important issue completely separate from the merits of the action that cannot be effectively reviewed on appeal from a final judgment. As Hickey's challenge to the sufficiency of the evidence before the grand jury does not raise a colorable claim under these criteria, his appeal from the district court's denial of his motion to

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transcript and determined that the indictments were based on probable cause.

[6] A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur – as in the Double Jeopardy Clause ("nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb"), . . . or the Speech or Debate Clause ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place"). 489 U.S. at 801 (internal citations omitted).

dismiss the superseding indictment for improprieties before the grand jury is dismissed for lack of jurisdiction.

VI

Hickey also seeks appellate review under the collateral order doctrine of the district court's denial of his motion to stay the trial. The district court abused its discretion, Hickey argues, by refusing to stay his trial notwithstanding claims that he lacked sufficient funds to retain experts indispensable to his defense. We have jurisdiction to review the district court's order denying Hickey's motion for a stay if the order conclusively resolves an important issue completely separate from the merits of the action and is effectively unreviewable on appeal. *Marchetti v. Bitterolf,* 968 F.2d 963 (9th Cir. 1992).

Whether or not Hickey's appeal is moot,[7] we lack jurisdiction to review the district court's order denying his motion for stay. The district court did not conclusively determine whether Hickey possessed sufficient funds to present his defense. Although Hickey's payment of the $1.1 million disgorgement order might raise doubts as to his alleged poverty, Hickey had options if he truly believed that he could not adequately prepare for trial. Hickey could have sought funding under the Criminal Justice Act[8] or he could have sought a limited continuance to address a

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[7] We note that: (1) Hickey's appeal from the contempt order in the SEC action has been dismissed, *Hickey,* 322 F.3d at 1123; (2) Hickey has paid the entire disgorgement order; and (3) the district court stayed proceedings pending these appeals.

[8] Hickey was aware of this option as his eligibility for appointed counsel under the Criminal Justice Act had been contested earlier in the litigation.

particularized need. Furthermore, Hickey may raise his arguments on appeal from a final judgment, should he be convicted.

VII

The collateral order doctrine is a time-honored and necessary exception to the finality rule. However, interlocutory appeals under the collateral order doctrine in criminal cases are properly limited to instances, such as colorable double jeopardy claims, where there are statutory or constitutional guarantees against the defendants standing trial. As none of Hickey's four contentions raises a colorable claim under the collateral order doctrine, these appeals are **DISMISSED** for lack of jurisdiction.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN A. HICKEY, *Defendant-Appellant.*	No. 02-10197 D.C. No. CR-97-00218-MMC
UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN A. HICKEY, *Defendant-Appellant.*	No. 02-10204 D.C. No. CR-97-00218-MMC ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted
January 13, 2004 – San Francisco, California

Filed April 30, 2004
Amended March 8, 2005

Before: J. Clifford Wallace, M. Margaret McKeown, and
Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Callahan

COUNSEL

David J. Cohen, Cohen & Paik, San Francisco, California, for the defendant-appellant.

Robin Harris, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

ORDER

The opinion is amended as follows: (a) the paragraph in section V that begins "Hickey's arguments meet none of the criteria" is deleted; (b) the first word of the next paragraph is deleted so that the sentence reads "The district court did not resolve an 'important issue'"; and (c) the following footnote is inserted at the end of the sentence:

> We need not decide whether Hickey's challenge to the indictments has been "conclusively determined," because, as we explain, that challenge does not meet the remaining requirements of the collateral order doctrine.

With these changes the petition for rehearing and the petition for rehearing en banc are denied. No further petition for rehearing will be entertained.